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Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

Owen S. Durigan,

Petitioner,

v.

Sanitary District No. 4 - Town of Brookfield, Wisconsin

Elvin G. Atkinson, Individually and in his Official Capacities,

Thomas J. Cole, Individually and in his Official Capacities,

Eugene E. Tenges, Individually and in his Official Capacities.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED FOR REVIEW

On July 11, 1997, the Defendants issued an order requiring the Petitioner and other property owners to connect to the municipal water system; they did NOT claim any public health or safety problem, nor supply any rationale for this action. [Lodging 1] They only state in their Water Use Ordinance [Lodging 4] that they are requiring all residents to connect to and become users of the municipal water to "assure preservation of public health, comfort, and safety."

1. May a municipality force property owners to connect to its public water system and give up their private well for most household purposes when there is NO showing of a present or anticipated public health or safety threat, nor a legitimate government purpose?

2. May a municipality force property owners to connect to its public water system and give up their private well for most household purposes when there is NO showing of a present or anticipated public health or safety threat, and the forced connections actually CONTRIBUTE to a public health or safety problem, making the forced connections per se IRRATIONAL?

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OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix "A" and is unpublished.

The Order of the United States Court of Appeals for the Seventh Circuit denying a rehearing of the court's opinion appears at Appendix "D" and is unpublished.

The opinions of the United States District Court - Eastern District of Wisconsin appear at Appendix "B" and Appendix "C" and are unpublished.

JURISDICTIONAL STATEMENT

This is an appeal from an order of the U.S. Court of Appeals for the Seventh Circuit issued on February 26, 2001 affirming the judgment of the District Court. A timely appeal for rehearing was denied by the United States Court of Appeals on May 30, 2001, and a copy of the order denying rehearing appears at Appendix "D". Therefore, this appeal to the United States Supreme Court is timely since it is within the prescribed period of ninety (90) days from the denial of the rehearing pursuant to 28 U.S.C. Sec. 2101(c) and Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The primary basis for this action against the Defendants is their violation of the Fourteenth Amendment which guarantees both substantive and procedural due process. Substantive due process guarantees that government actions will essentially be fair, and that there is a

reasonable relationship between a government's actions and its objectives. These rights are enforced pursuant to 42 U.S.C. Sec. 1983.

Wisconsin Statute 281.45 [Lodging 2] allows a municipality to force property owners to connect to municipal water providing that there is a public health or safety problem that will be solved by the forced connections. See Section V infra. If this were NOT a requirement, then the forced connections could be arbitrary and capricious, in violation of the Fourteenth Amendment. It is noted that, in Wisconsin, statutes are interpreted in such a way as to make them constitutional if at all possible. Section V, Id. It is also noted that the preamble to Wis. Stat. 281.45 (formerly 144.06) was added in 1951 to clarify this requirement. [Lodging 3]

The Defendants' Water Use Ordinance [Lodging 4] requires property owners to connect to the municipal water. It cites Wis. Stat. 281.45 as the enabling legislation; however, since there is NO reasonable relationship between the forced connections and the solution to a present or potential public health or safety problem, the ordinance is in violation of the Fourteenth Amendment. It is noted supra that, for constitutionality, Wis. Stat. 281.45 requires a showing of a public health or safety problem that will be solved by forced connections, and it therefore CANNOT enable the Defendants' Water Use Ordinance NOR impart constitutionality to their actions.

STATEMENT OF THE CASE

The Defendants have forced the Petitioner and other Town of Brookfield, Wisconsin property owners to connect to their municipal water system by their Notice to Connect issued July 11, 1997. [Lodging 1] The Defendants rely primarily on Wisconsin Statute 281.45, supra. [Lodging 2] which the Petitioner contends does NOT confer authority to do this since they do NOT plead any public health or safety problem, NOR supply any rationale for their actions. The Defendants also rely on a 3rd Circuit New Jersey case which the Petitioner contends is NOT applicable since there was contamination. Stern v. Halligan, 158 F.3d 729, fn4 (3rd Cir. 1998). The Petitioner on the other hand relies on caselaw from the Nebraska and Georgia Supreme Courts which are directly on point, and which do NOT allow municipalities to force connection to their municipal water system without a showing of a health or safety problem. These cases are in direct conflict with Stern and other cases cited by Stern. See Section I infra. The Petitioner also relies on the Fourteenth Amendment and caselaw which requires that there be a reasonable relationship between a government's actions and its objectives for the actions to be constitutional. In the present case, the Petitioner contends that there is NO logical nexus between the forced connections and the objective of preserving the public health and safety, making the forced connections arbitrary and capricious and, therefore, unconstitutional. In fact, the Petitioner has submitted evidence, which has been completely ignored by the lower courts, showing that the forced connections are

actually detrimental to the Defendants objective of assuring preservation of public health and safety, making the Defendants' actions per se IRRATIONAL.

REASONS FOR GRANTING THE WRIT

The Petitioner submits that there are three compelling reasons for The Court to grant this petition:

1. There is a conflict between decisions from the State Supreme Courts of Nebraska and Georgia and the Courts of Appeal for the Third and Seventh Circuits.

2. This is a case of first impression in Wisconsin involving constitutional rights and freedoms of all residents of Wisconsin, and is of national importance.

3. The lower courts have erred by NOT considering the Petitioner's evidence and caselaw and, in so doing, have themselves violated the Petitioner's right to due process.

I. CONFLICTS BETWEEN STATE SUPREME COURTS AND CIRCUIT COURTS

A. Eckstein v. City of Lincoln, 202 Neb. 741 (1979)

The Supreme Court of Nebraska prohibited the City of Lincoln from forcing its residents to connect to its municipal water system. The court stated that "the right to full and free use and enjoyment of one's property in a manner and for such purpose as the

owner may choose, so long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law, and one of which a property owner may not be deprived without due process of law." Also, "a police regulation cannot arbitrarily invade private property or personal rights." It also held that there must be a reasonable relationship between the object the ordinances seeks to accomplish and the means by which it operates. The court held that the City's ordinance requiring connection was overbroad and, in effect, unconstitutional.

B. City of Midway v. Midway Nursng and Convalescent Center, 230 Ga. 77 (1973)

The Supreme Court of Georgia stated: "while we recognize that a municipality can, in the exercise of its police power, make reasonable regulations to protect its citizens, including measures designed to preclude the use of water unfit for human consumption or other use, as obtained from a user's private source, or as supplied to a user by others, we see no reason to recognize a claim for injunctive relief or declaratory judgment by the city absent some indication from the claim, as alleged, to show that some reasonable basis exists for protecting the health and welfare of its citizens in this manner". It also stated: "however, the city cites no case suporting the proposition that a municipal corporation can dictate to its citizens the use of city supplied water. To the contrary see 94 CJS 29,

31, Waters, Sec. 235, citing Harrisburg v. Pennsylvania R. Co., 33 Pa. Co. 641." "Accordingly, we hold that the City of Midway had no authority to enact Sec. 17 of the Water Code requiring connection to the city water system and payment of a minimum charge . . ." City of Midway, Id.

C. Stern v. Halligan, 158 F.3d 729 (3rd Cir. 1998)

The District Court Decision cited Stern as follows: [App. "B", p. 9]

> "[P]laintiffs have no right to have their wells service their houses, even though the township has not proven that the wells are dangerous. Indeed, even if the plaintiffs can prove the current safety of their water, they would not be exempt from the generally applicable connection requirement. Mere over-or-under inclusivness will not invalidate social welfare regulation so long as the state action represents a RATIONAL RESPONSE to a LEGITIMATE PROBLEM." (emphasis added)

However, fn4, Stern, Id., states:

> "It also appears that contaminated private wells are a significant problem in many areas of New Jersey, including Ocean County, where the plaintiffs' property is located".

It is noted that even THIS case admits that forced connections MUST be a rational response to a legitimate problem, which is NOT the case in the case at bar.

D. Other Decisions.

Stern, Id. and the District Court also cited other cases to support their position. e.g., although the city won in Shrader v. Horton, 471 F.Supp 1236 (W.D.Va.) (1979), the statute was amended shortly thereafter to NOT require residents to connect to the municipal water system. Id., 626 F.2d 1163, fn5 (4th Cir. 1979), which was a victory for other citizens in the future. This case relied heavily on Hutchinson v. City of Valdosta, 227 U.S. 303 (1913) involving forced SEWER connections, which have been distinguished from forced WATER connections by other courts. See e.g., City of Midway v. Midway Nursing and Convalescent Center, 230 Ga. 77 (1973), and Hummings v. City of Woodbine, 253 Ga. 255 (1984). The case of Tidewater Ass'n of Homebuilders, Inc. v. City of Virginia Beach, 400 S.E.2d 523,526 (Va. 1991) is NOT applicable to the issue at hand since it did NOT involve forced connections to municipal water; the ONLY issue was whether municipal water customers could be made to pay for a $200,000,000 water project ENTIRELY, rather than spreading the cost to all residents. Rupp v. Grantsville City, 610 P.2d 338 (Utah 1980) is also a case involving forced SEWER connections, which, as mentioned supra, have been distinguished from forced WATER connections. In Town of Ennis, property owners who objected to connecting to the municipal water brought only a "privacy right" claim -- they did NOT bring a due process claim, which is much stronger. See Gryczan v. State of Montana, 1997.MT.131, Para. 84.

E. Laws of States Without Caselaw

Most other states and cities do NOT appear to have a policy of forced connection to municipal water. For example, Minnesota has NO requirement to connect to municipal water, nor does Minneapolis and its surounding municipalities. In Iowa, only restaurants and hotels are required to connect to municipal water. See Iowa Code sections 137A.17 and 137C.16. Illinois also does NOT require connection without a VALID reason. The reason that there is NOT more caselaw on forced connections is probably because the vast majority of states and cities do NOT require connection to municipal water.

The Petitioner submits that these conflicts between the courts must be resolved in the interests of justice and of the development of this area of the law throughout the country.

II. IMPORTANCE OF FORCED CONNECTIONS TO WISCONSIN RESIDENTS AND GENERAL PUBLIC

The issue of forced connection to municpal water is of great importance to the general public both as an issue in itself, and also as it impacts on the public's general constitutional property interests and the constitutional right to be free from arbitrary and unnecessary government interference -- rights guaranteed by the Fourteenth Amendment.

In addition to the Town of Brookfield, municipal water has been attempted to be forced by other municipalities in Wisconsin such as the Village of Lannon, City of New Berlin and City of

Delafield. In New Berlin and Delafield, the cities were trying to force residents to connect to municipal water that was contaminated with radium. Although the residents of these municipalities were able to avoid forced connection to municipal water thus far by political means, there needs to be clear law in Wisconsin that allows residents with healthy wells to continue to use them without bureaucratic interference. In a democracy, government is supposed to reflect the will of the people -- NOT the other way around. The citizenry should NOT have to fight with its so-called "public servants" over senseless municipal edicts. The Petitioner submits that forced connections to municipal water without a current or impending health or safety problem is one of the clearest cases imaginable of what the Fourteenth Amendment is supposed to protect us from.

III. DUE PROCESS AND REASONABLE RELATIONSHIP

Due process requires that there be a reasonable relationship between a government's objectives and the means chosen to reach those objectives. For example, see City of Mesquite v. Aladdin's Castle, 455 U.S. 283, Para. [61] (1982). "Assuming that the rational basis test is the standard of review, we conclude that no such rationality supports ordinance No. 1353. The test requires that legislative action be rationally related to the accomplishment of a legitimate state purpose. First, the challenged legislation must have a legitimate public purpose based on promotion of the public welfare, health or safety (citations omitted). Second, the act taken must bear a rational relation to the end it seeks to further." (cita-

tions omitted) Id. at para. [61]. "The requirement of legislative rationality in the service of legitimate purposes protects individuals and their liberties from official arbitrariness or unthinking prejudice." Id. at para. [62]. Also, "the guaranty of due process . . . demands only that the law shall NOT be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Liberty Homes, Inc. v. DIHLR, 136 Wis. 2d 368, 374-76 (1986) (emphasis added). In the case at bar, the Defendants' actions have NO valid public purpose. Although their objective of protecting the public health and safety represents a legitimate public interest, their actions are NOT rationally related to this objective since the Defendants do NOT even claim that there is a present or impending public health or safety problem to be solved by forced connection to municipal water. Therefore, their ordinance is NOT designed to solve any problem that exists or is anticipated, and is therefore arbitrary and unconstitutional.

IV. IRRATIONALITY OF DEFENDANTS' ACTIONS.

The property owners are allowed to continue using their private wells for limited outside purposes such as watering their lawns in the summertime, [Lodgings 1 and 5] while the wells sit idle the rest of the year. The Petitioner has submitted evidence that these little-used wells are MORE prone to contamination than wells used regularly, and COULD even contaminate the municipal aquifer. [DNR report, Lodging 6 and Petition for Rehearing, Lodging 7, pp. 1-2] Therefore, the Defendants' actions are adverse to

their own objective of protecting the public health, and are therefore IRRATIONAL. The Petitioner requests Judicial Notice of the well-established principle that irrationality of a government action is sufficient to make the action unconstitutional under the Fourteenth Amendment.

V. WISCONSIN STATUTE 281.45

Wis. Stat. 281.45 states that: "To assure preservation of public health, comfort, and safety . . . [a municipality may force connection to its municipal water system]." [Lodging 2]. However, all government actions must be RATIONALLY related to the objectives of the actions in order for them to be constitutional. See Section III supra. If a municipality could force property owners to connect to its water system for no reason whatsoever, on a whim say, this action would be arbitrary and capricous, and therefore unconstitutional under the Fourteenth Amendment. Section III, Id. Therefore, for Wis. Stat. 281.45 to be constitutional, the preamble, supra, must be interpreted as REQUIRING a public health or safety problem which would be solved by a municipality forcing residents to connect to its public water system. A statute, such as this, CANNOT grant unconstitutional authority or it would itself be unconstitutional and, "the cardinal rule of statutory construction is to preserve a statute and to find it constitutional if it is at all possible to do so." Redevelopment Authority v. Uptown Arts and Education, Inc., 229 Wis. 2d 458, para. [16], (1999). Also, "we may construe constitutionally deficient statutes to include constitutionally

required provisions." Uptown, Id. (quoted sources omitted) Therefore, the presumption is that Wis. Stat. 281.45 IS constitutional. However, for this to be true, the preamble, supra, MUST be construed to REQUIRE that there be a public health or safety problem PRIOR to a municipality forcing its citizens to connect to its public water system; this is the ONLY way that Wis. Stat. 281.45 can satisfy the substantive due process requirement of the Fourteenth Amendment, which requires a reasonable relationship between a government's objectives and the means which it chooses to reach those objectives. Since the Defendants do NOT claim any public health or safety problem to be solved, the forced connections represent an arbitrary and unconstitutional exercise of police power. Therefore, the Sanitary District's Water Use Ordinance is unconstitutional since there is NO rational relationship between the forced connections, which it mandates, and the objective of preserving the public health and safety.

VI. ERRORS IN DECISIONS OF LOWER COURTS

The Petitioner submits that the lower courts have erred as follows:

1. The lower courts have refused to consider Petitioner's evidence and much of his caselaw. For example, The Appellate Court completely ignored Petitioner's directly-on-point caselaw from two state supreme courts, and the District Court only mentioned them, choosing to ignore them. The courts also ignore the fact that little-used wells which are mostly idle after the forced

connections are more prone to contamination than wells that are used regularly. [Lodging 6]. All courts are able to take judicial notice of this type of evidence.

2. The Petitioner contends that he has raised genuine issues of material fact which the lower courts have refused to recognize such as the fact that little-used wells are more prone to contamination, supra, which shows that the Defendants' actions are per se IRRATIONAL. See Lodging 7, pp. 1-2.

3. The trial court's decisions were hopelessly confused between the Petitioner's claims against defendant Town of Brookfield and defendant Sanitary District No. 4. [App. "B" and App. "C"] This has been remedied by the Petitioner dropping Defendant Town of Brookfield on appeal. [App. "A"] Therefore, any parts of the lower court decisions relating to the Town of Brookfield or its Ordinance 15.22 are NO longer applicable. The ONLY issue is the constitutionality of the actions of the Sanitary District in forcing connection to its public water system.

4. There are also many other errors in BOTH court's Decisions. See e.g. Petition for Rehearing, pages 6 to 8 for Appellate Court errors. [Lodging No. 7]

CONCLUSION

The Court should grant this petition

for a Writ of Certiorari since the law in this area needs to be settled. There are conflicts between the decisions of the Nebraska and Georgia Supreme Courts with the 3rd and 7th U.S. Circuit Courts of Appeal on the issue of forced connection to municipal water. Therefore, the Supreme Court should resolve this issue once-and-for-all for the good of the country as well as for the Petitioner and other Wisconsin residents.

Dated this 19th day of July, 2001

Respectfully submitted,

Owen S. Durigan

Owen S. Durigan
Petitioner

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 22, 2001*
Decided February 26. 2001

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

No. 00-3024

OWEN S. DURIGAN,
Plaintiff-Appellant,

V.

SANITARY DISTRICT NO. 4-TOWN OF BROOKFIELD, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 99-C-262

Charles N. Clevert, *Judge.*

ORDER

Sanitary District No. 4, the municipal entity that provides water and sewer services in Brookfield, Wisconsin, ordered Owen Durigan to connect his Brookfield home to the municipal water system. Durigan prefers, however, to pump his drinking water from a private well on his property. He refused to comply and filed this pro se civil rights

lawsuit against the Sanitary District, its Commissioners, and the Town of Brookfield, seeking relief from the District's order. The district court granted summary judgment to the defendants. Durigan appeals, and we affirm.

When Durigan bought his home some time ago, Brookfield's municipal water system did not reach his subdivision, Lookout Hill, so he pumped his drinking water from a private well on his property. In 1995 Sanitary District No.4 notified Durigan and his neighbors that it planned to extend water service to Lookout Hill and that all subdivision residents would be required to connect. Durigan sought to head off the District's expansion by suing it in state court. Durigan claimed that the District was required to submit its proposed expansion to a local referendum, but the Wisconsin courts dismissed his complaint and rejected his appeals.

In May 1997 the Sanitary District amended an existing ordinance to require all Brookfield property owners to connect to the municipal water supply within two years of the installation of a water main abutting their property. If a property owner failed to comply, the District was authorized to complete the connection and charge the property owner for the work. Brookfield simultaneously enacted § 15.22 of the Town Code requiring that property owners disconnect their homes from and discontinue using any private wells on their property once they connected to the water main. Property owners who wished to maintain their private wells after connecting to the water main could apply to the Sanitary District and the Wisconsin Department of Natural Resources for a Well Operation Permit, which would be conditioned upon water quality tests verifying that the private well was not contaminated.

The Sanitary District installed a water main abutting Durigan's property in July 1997, and promptly mailed him

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After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a)(2).

a Notice to Connect his home to the water main by July 1999. The notice advised Durigan that he had to abandon his well or seek a permit to continue using it. Durigan did not connect his home to the water system. Eighteen months later he filed this civil rights lawsuit under 42 U.S.C. § 1983 in the district court complaining that the Sanitary District, its Commissioners, and Brookfield deprived him of a property and liberty interest in violation of the Fourteenth Amendment, and conspired to deprive him of his civil rights in violation of 42 U.S.C. § 1985. He also claimed that Section 281.45 of the Wisconsin Statutes, the legislation enabling local governments to enact ordinances compelling connection to centralized municipal water systems, was unconstitutionally vague or overbroad.

The defendants moved for summary judgment. Their motion, however, did not include the required notice informing Durigan of the consequences of failing to respond, see *Lewis v. Faulkner,* 689 F.2d 100, 102 (7th Cir. 1982); E.D. Wis. Local R. 6.04, nor did it generally comply with Federal Rule of Civil Procedure 56 or contain a proper legal argument or proposed findings of fact as required by Local Rule 6.05(a). Citing these grounds, the district court declined to rule on the merits of the motion and denied it without prejudice. Durigan then moved the court to strike the defendants' pleaded affirmative defenses of res judicata and failure to exhaust state remedies, and to reject any further summary judgment motions from the defendants because they had "already utilized this opportunity." The district court denied Durigan's motion without prejudice for failure to comply with the Federal Rules of Civil Procedure and the Local Rules, and advised Durigan that he needed to file a proper summary judgment motion to obtain the requested relief.

The defendants renewed their motion for summary judgment, this time complying with the rules. After Durigan filed two responses, the district court granted the defendants' motion. The court found that the ordinances

aimed to promote the public welfare and safety by preventing contamination of Brookfield's water system, and that these ordinances were rational, legitimate exercises of the police power.

We review *de novo* the district court's grant of summary judgment, applying the same standards as the district court and viewing the record and all reasonable inferences drawn from it in the light most favorable to the nonmoving party. *Erdman v. City of Fort Atkinson,* 84 F.3d 960, 961 (7th Cir. 1996). We will affirm if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

On appeal, Durigan has dismissed Brookfield as an appellee and abandoned his challenge to § 15.22 of its Town Code. His principal argument is that the Sanitary District's ordinance does not bear a rational relationship to its stated objectives. He claims that the District failed to submit evidence explaining how forced connections actually prevent contamination of the water supply, or why private wells pose a "legitimate problem." Durigan argues that a better solution exists:requiring residents such as himself to periodically test their wells. Since Durigan claims to have evidence showing that no legitimate problem currently exists, he argues that a genuine issue of material fact exists for trial.

"Substantive due process" is a substantive limitation on the power of government to legislate, preventing legislatures from trampling on fundamental rights found elsewhere in the constitution. *Gosnell v. City of Troy*, 59 F.3d 654, 657 (7th Cir. 1995); *Schroeder v. City of Chicago*, 927 F.2d 957, 961(7th Cir. 1991); *Conniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461,465 (7th Cir. 1988). Land use regulations satisfy substantive due process if they do not violate a specific constitutional guarantee and are rationally related to a legitimate governmental interest. *Pro-Eco, Inc. v. Board of Comm'rs*, 57 F.3d 505, 514 (7th

Cir. 1995); *Gamble v. Eau Claire County*, 5 F.3d 285, 287 (7th Cir. 1993); *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 567 (7th Cir. 1991); *Conniston Corp.*, 844 F.2d at 467.

Durigan asserts that the Sanitary District has failed to justify its ordinance. But as the challenger, he bears the burden of negating any conceivable basis that might support the rule, *National Paint & Coatings Ass'n*, 45 F.3d at 1127, and this he has not done. Protection of the public health is a sufficient reason to justify the regulation of privately-owned land. *See Pro -Eco*, 57 F.3d at 514. The Wisconsin legislature empowered local governments to require dwellings to connect to centralized water systems and to prevent cross-connections between municipal water systems and shallow, easily contaminated, and difficult-to-regulate public wells. See Wis. Stat. § 281.45; Wis. Admin. Code § NR 811. Recently, the Third Circuit, in a case factually identical to this one, determined that cross-connections between private wells and public supply wells pose an acute danger to the public health, safety, and welfare because private wells tend to be shallow and susceptible to contamination by naturally-occurring carcinogenic compounds, road salt, pesticides, fertilizers, spilled chemicals and petroleum products, and bacteria-laden waste from septic tanks, sewer lines, pets, farm animals, and wildlife. *See Stern v. Haligan*, 158 F.3d 729, 732 (3d Cir. 1998). For this reason, the Third Circuit held that regulating the public water supply by mandating connections to centralized municipal water systems is a rational and legitimate exercise of the police power. *Id.* We agree. Providing safe water and sewer services is a core function of government. *City of Trenton v. New Jersey*, 262 U.S. 182, 185 (1923); *Hutchinson v. City of Valdosta*, 227 U.S. 303, 308 (1913); Stern, 158 F.3d at 732; *Shrader v. Horton*, 471 F. Supp. 1236, 1243 (W.D. Va. 1979), *aff'd* 626 F.2d 1163 (4th Cir. 1980); *accord. Magnuson*, 933 F.2d at 567 (noting that municipal water and sewer systems are "fundamentally

interdependent"). Requiring property owners to connect their buildings to a centralized public water supply rather than allowing a myriad of difficult-to-monitor and more easily contaminated private wells is a legitimate exercise of the police power.

Durigan attempts to distinguish *Stern* by pointing out that contaminated private wells are a significant problem in the New Jersey region where the Stern case arose. *See Stern,* 158 F.3d at 732 n.4. He claims that no such problems have been documented in his community, but offers what he believes is a better, less-intrusive way to prevent them: mandatory testing of private wells. The Third Circuit, however, merely noted the local contamination problem; its analysis did not turn on it. *See id.* at 731 n.2. But more importantly, legislatures may take prophylactic action to protect the public from perceived threats to its health, safety, or welfare, so long as the action is rational. *National Paint & Coatings Ass'n,* 45 F.3d at 1127-28. Legislatures need not choose the least restrictive means of regulation, and we will not second-guess which ever options Wisconsin and the Sanitary District determined would best achieve its goals. *See Id.*

Finally, Durigan asserts that the district court violated his due process rights by allowing the defendants a second opportunity to move for summary judgment. It is within the district court's discretion to deny a motion for summary judgment without prejudice to its being renewed at a later time, and may do so if good cause is shown. *See Curran v. Kwon,* 153 F.3d 481, 487 n. 11. Here, the district court denied the defendants' motion because they failed to comply with the procedural rules. The district court did not address its merits. We believe that good cause was shown and see no abuse of discretion.

Accordingly, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

OWEN S. DURIGAN,

Plaintiff,

Case No. 99-C-262

v.

SANITARY DISTRICT NO. 4 -
Town of Brookfield;
ELVIN G. ATKINSON, Individually
and in his official capacities as a
Commissioner and as President of
Sanitary District No. 4;
THOMAS J. COLE, Individually and
in his official capacities as a
Commissioner and as Secretary of
Sanitary District No. 4;
EUGENE E. TENGES, Individually
and in his official capacities as a
Commissioner and as Treasurer of
Sanitary District No. 4;
TOWN OF BROOKFIELD,

Defendants.

DECISION AND ORDER DENYING PLAINTIFF'S MOTION TO STRIKE SUMMARY JUDGMENT MOTION (DOC. #80), GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. #75), DENYING PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES AS MOOT (DOC. #65), AND DISMISSING CASE WITH PREJUDICE

Plaintiff Owen Durigan filed this action on March 17, 1999, challenging an ordinance requiring him to connect to the Town of Brookfield, Wisconsin, municipal water system by July 11, 1 999, or to apply for a limited-use permit. Durigan alleges that the connection mandate violates

his Fourteenth Amendment rights by depriving him of his liberty and property interests. He also alleges that defendants conspired to deprive him of his rights in violation of 42 U.S.C. § 1985. For the reasons set forth below, the court will deny Durigan's motions to strike and grant defendants' motion for summary judgment.

DURIGAN'S MOTION TO STRIKE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Durigan argues that defendants' summary judgment motion is identical to the motion denied by this court on December 1 3, 1999. He submits that it is neither appropriate nor equitable that defendants receive "another bite at the apple."

There are three reasons why Durigan's motion will be denied. First, the December 13, 1999, order denying defendants' motion for summary judgment was based on failure to comply with local and federal rules. It was entered without prejudice, and the court never reached the merits. Second, the motions are not identical. Defendants' pending summary judgment motion is supported by citations and evidence not filed in connection with the initial motion. Third, at the last pretrial conference this court extended the deadline for filing dispositive motions to April 17, 2000. Prior to doing so, this court repeatedly asked plaintiff to identify any and all issues appropriate for a jury. When the parties sought additional time to brief questions of law and fact, this court concluded that extending the time for filing dispositive motions would make the most efficient use of judicial time and resources. Hence, the court not only extended the deadline for filing dispositive motions, but also invited cross-motions. Consequently, plaintiff's motion to strike will be denied.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In reviewing a motion for summary judgment, the court must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party." *Bellaver v. Quanex Corp.,* 200 F.3d 485, 491-92 (7th Cir. 2000). Summary judgment is proper if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986). However, the nonmoving party, is required to set forth "specific facts showing that there is a genuine issue" of material fact Fed. R. Civ. P. 56(e), and to produce more than a scintilla of evidence in support of his position, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Findings of Fact

Defendant Sanitary District No. 4 is a municipal corporation created by the Town of Brookfield in accordance with Wis. Stats. Subchapter IX, Chapter 60. (Aff. Atkinson, ¶ 3) The Town of Brookfield is a corporate and political body with powers granted by the State Legislature as set forth in Wis. Stats. Ch. 60. (Aff. Atkinson, ¶ 4) And, at all times relevant to this action, Elvin G. Atkinson, Thomas G. Cole, and Eugene E. Tenges served as the President and Commissioners of the Sanitary District. (Aff. Atkinson, ¶ 5)

On May 14, 1 997, the Sanitary District amended the October 23, 1996, Water Use Ordinance in accordance with Wis. Stat. § 281.45. (Aff. Atkinson, ¶ 6, Exs. A and B) Both the Water Use Ordinance and the amendment contain the following provision:

MANDATORY CONNECTION TO
MUNICIPAL SERVICE

> All properties shall connect to the municipal water service and become a user of the water utility two (2) years from the date the water becomes available for connections to be made to it, as stated in the Notice to Connect; or, in the case of a deferred assessment, within two (2) years from the date the assessment becomes final.

In addition, the Town Board enacted an ordinance repealing and recreating Section 15.22 of the Town Code. Pursuant to Section 15.22 of the Town Code, as amended May 20, 1 997, any private well on the property must be abandoned or, alternatively, the property owner must obtain a permit from the Sanitary District to operate the well for a period not to exceed five (5) years. Issuance of permits are conditioned upon the property owner having water quality tests conducted to verify that the private well is not a source of contamination. Such permits may be renewed upon application of the property owner. Section 15.22 of the Town Code further precludes use of the private well for residential purposes after a connection has been made to the municipal water system. (Aff. Atkinson, ¶¶ 11 and 12, Ex. D)

On July 11, 1997, Durigan was issued a notice requiring him to connect the residential building located on his property to the municipal water system in accordance with the terms of the May 14, 1 997, Water Use Ordinance. (Aff. Atkinson, ¶ 10, Ex. C) Since that time, the water service provided by the Sanitary District has been available to Durigan's property at 21475 Mary Lynn Drive, Brookfield, Wisconsin. (Aff. Atkinson, ¶ 9)

Durigan initiated this action on March 17, 1999,

challenging the constitutionality of Section 15.22 as amended, May 20, 1997, and the related Water Use Ordinance of May 14, 1997.

DISCUSSION

Defendants argue that the challenged ordinance represents a valid exercise of statutory authority designed to "prevent contamination of ground water and to protect public health, safety, and welfare by assuring that unused, unsafe, or non-complying wells which may serve as conduits for contamination are properly abandoned." See Town of Brookfield Code Section 15.22, Section 1. They contend that as such, the ordinance bears a rational relationship to a legitimate state interest and is an appropriate use of its police power.

Durigan believes that defendants must demonstrate a serious threat to the public health or safety before acting under Wis. Stat. § 281.45, and that there is no rational relationship between the town ordinance and its stated objective. According to Durigan, the ordinance actually conflicts with that objective because uncapped wells that remain after the forced connection are more susceptible to contamination.

In challenging the ordinance, Durigan relies on his "liberty interest in using whatever source of water" he chooses.

Section 281.45 of the Wisconsin Statutes provides:

> To assure preservation of public health, comfort and safety, any city, village or town or town sanitary district having a system of waterworks or sewerage, or both, may by ordinance require buildings used for human habitation and located adjacent to a sewer or water main, or in a block through which one or both of these

> systems extend, to be connected with either or both in the manner prescribed. If any person fails to comply for more than ten days after notice in writing the municipality may impose a penalty or may cause connection to be made, and the expense thereof shall be assessed as a special tax against the property . . ..

In addition, Section NR 811 .09 of the Wisconsin administrative Code provides in pertinent part:

> **Cross-connections and interconnections.** (1) Cross-connection control program. The supplier of water for every municipal water system shall develop and implement a comprehensive control program for the elimination of all existing cross-connections and prevention of all future cross-connections. A record of the cross-connection control program shall be kept current and available for annual review by the department. The control program shall include but not be limited to: . . . (b) Local authority for implementation of the program, such as ordinance or rule . . ..

The Town of Brookfield and its Sanitary District enacted and amended the water use ordinance requiring property owners to connect their residence to the municipal water system within two years after the municipal water system became available. The water use ordinance, as amended, contains connection and enforcement provisions tracking the language of Wis. Stat. § 281.45:

> In accordance with § 281.45, Stats., and in order to assure preservation of public

> health, comfort, and safety, all buildings used for human habitation and located adjacent to a water main, or in a block through which a water main extends, shall be connected to the water main system as prescribed by this ordinance . . .

Likewise, the ordinance repealing then recreating section 15.22 of the Town Code states as its general purpose "to prevent contamination of groundwater and to protect public health, safety, and welfare by assuring that unused, unsafe or noncomplying wells or wells which may serve as conduits for contamination are properly abandoned or wells which may be illegally crossconnected to the municipal water system, are properly abandoned."

Despite this language, Durigan contends that defendants acted outside of their statutory authority in adopting the water use ordinance and section 15.22 of the Town Code. However, that argument is specious in light of section 281.41, the enabling authority. Section 281.45 is designed to assure public health and safety by requiring connections to sewer and water lines, but its plain language does not require a particularized showing of a serious threat. Therefore, a sewer or water connection may be mandated. Moreover, the Wisconsin Administrative Code clearly contemplates enactment of a *local ordinance or rule by a local authority* precluding cross-connections. Durigan asserts that this section does not apply to a town or sanitary district; however, section NR 811 .01 states that the authority to promulgate and enforce the rules under chapter NR 811 are contained in chs. 280 and 281 as previously discussed. Hence, this court concludes that the water use and town code ordinance at issue were enacted in accordance with enabling authority.

General economic and social welfare legislation, such as that before the court, may be stricken down as violative of due process only when it fails to meet a mini-

mum rationality standard. *Stern v. Halligan,* 158 F.3d 729, 731 (3d Cir. 1998). This standard is "extremely difficult for a plaintiff to meet." *Id.* The only question is "whether the law at issue bears any rational relationship to any interest that the state legitimately may promote; simple unfairness will not invalidate a law." Id. The challenger bears the burden of proving irrationality. *Id.*

Under facts similar to the case at bar, the plaintiffs in Stern challenged a local ordinance forcing them to connect to the municipal water supply. *Id.,* 158 F.3d at 731 . The Stern plaintiffs wished to avoid connection to the municipal water system and to continue using their wells for drinking and other household purposes. *Id.* The Third Circuit Court of Appeals rejected their substantive due process claim and recognized mandatory connection to public water as a legitimate exercise of police power even without proof of danger to each and every person stating:

> [P]laintiffs have no right to have their wells service their houses, even though the township has not proven that the wells are dangerous. Indeed, even if the plaintiffs can prove the current safety of their water, they would not be exempt from the generally applicable connection requirement. Mere over- or under inclusiveness will not invalidate social welfare regulation so long as the state action represents a rational response to a legitimate problem. See Lindsey Coal Mining Co., 90 F.3d at 694-95. Mandatory connections to public utilities are classic examples of social welfare regulations that merely adjust the burdens and benefits of life in the modern world. It cannot escape our notice that from the inception of such sanitary programs and even during the Lochner era- courts have

> routinely rejected constitutional challenger to mandatory connection requirements. . . . *Id.*, 158 F.3d at 734.

Similarly in *Shrader v. Horton*, 471 F. Supp. 1236 (W.D. Va. 1979), *aff'd.*, 626 F.2d 1163 (4th Cir. 1980), the Fourth Circuit Court of Appeals affirmed the district court's decision that an ordinance requiring residents to connect to a public water supply did not violate the plaintiffs' constitutional rights. Although the plaintiffs in *Shrader* argued that the defendants' actions constituted a taking in violation of the Fifth and Fourteenth Amendments, the court's analysis is instructive. Id., 471 F. Supp. at 1242-1243. The court relied heavily on *Hutchinson v. City of Valdosta,* 227 U.S. 303 (1913), finding no meaningful distinction between mandatory water connections in *Shrader* and mandatory sewer connections in *Hutchinson. Id.,* 571 F. Supp. at 1243. Significantly, the United States Supreme Court wrote:

> It is the commonest exercise of the police power of a State or city to provide for a system of sewers and to compel property owners to connect therewith. And this duty may be enforced by criminal penalties. *District of Columbia v. Brooke*, 214 U.S. 138, 29 S. Ct. 560, 53 L. Ed. 941 . It may be that an arbitrary exercise of the power could be restrained, but it would have to be palpably so to justify a court in interfering with so salutary a power and one so necessary to the public health.

Hutchinson, 227 U.S. at 308, 33 S. Ct. at 292.

Durigan argues, in the case at bar, that the foregoing authority is distinguishable because there is no showing of pollution in his area. But this is a false distinction in light

of the language in *Stern* that the case "does not turn" on evidence about the safety of the particular wells, *Stern,* 158 F.3d at 730, fn. 2, or proof of danger to "each and every affected person." *Id.,* 158 F.3d at 732.

Durigan relies on *City of Midway v. Midway Nursing & Convalescent Center, Inc.,* 195 S.E.2d 452 (Ga. 1 973), where the Supreme Court of Georgia determined that a municipality must show some reasonable basis for protecting the health and welfare of its citizens. Absent any showing, a municipality does not possess the authority to enact the code that required connection to the city public water system and payment of a minimum charge. Id. The *Stern* court made reference to the negative response *Midway* received for its "crabbed understanding" of the scope of a municipality's police power over health and safety issues and added that an overwhelming majority of courts have found mandatory connection to public water to be a legitimate exercise of police power. *Stern,* 158 F.3d at 732.

Durigan also cites *Eckstein v. City of Lincoln,* 277 N.W.2d 91 (Neb. 1979), which addressed whether a regulation to prevent water contamination is valid if the well is not yet contaminated. The court found the ordinance to be overbroad because evidence did not support a finding that the possibility of the plaintiff's well becoming contaminated is sufficiently probable to justify an absolute prohibition against its use. *Id.* This holding is in stark contrast to *Stern,* which found that the mere over or under inclusiveness will not invalidate social welfare regulation so long as the state action represents a rational response to a legitimate problem." *Stern,* 158 F.3d at 734.

Here, the defendants' stated interests are to promote public welfare and safety by preventing contamination of the Town of Brookfield's water supply. This is a valid concern and a proper exercise of police power. *Stern,* 158 F.3d at 732; *Shrader,* 471 F. Supp. at 1243; *Hutchinson,*

227 U.S. at 308. As the court observed in Stern:

> Because pure water is a precondition for human health, regulating the water supply is a basic and legitimate governmental activity. A municipal water supply replaces a myriad of private water sources that may be unmonitored or, at best, difficult, expensive, and inefficient to monitor. Therefore, a legislature may rationally conclude that a public water supply is the simplest and safest solution for its citizenry as a whole without proof of danger to each and every affected person.

Id., 158 F.3d at 732. Although Stern is not binding on this court, its rationale and holding are persuasive. Therefore, this court concludes that the legislation at issue bears a rational relationship to the State of Wisconsin's interest in protecting the health and safety of its inhabitants. To the extent that plaintiff disagrees, he must seek recourse through the political process.

Because Durigan has shown no constitutional violation, there is no basis for his conspiracy claims. Moreover, Durigan's motion to strike affirmative defenses is now moot.

Accordingly,

IT IS ORDERED that Durigan's motion to strike defendants' motion for summary judgment is denied.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is granted.

IT IS FURTHER ORDERED that Durigan's motion to strike affirmative defenses is denied as moot.

Dated at Milwaukee, Wisconsin, this 11th day of July, 2000.

BY THE COURT

C. N. CLEVERT
U. S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

OWEN S. DURIGAN,

Case No. 99-C-262

Plaintiff,

v.

SANITARY DISTRICT NO. 4 -
Town of Brookfield;
ELVIN G. ATKINSON, Individually
and in his official capacities as a
Commissioner and as President
of Sanitary District No. 4;
THOMAS J. COLE, Individually
and in his official capacities as a
Commissioner and as Secretary
of Sanitary District No. 4;
EUGENE E. TENGES, Individually
and in his official capacities as a
Commissioner and as Treasurer
of Sanitary District No. 4;
TOWN OF BROOKFIELD,

Defendants .

DECISION AND ORDER CONSTRUING PLAINTIFF'S LETTER DATED JULY 19, 2000, AS A MOTION TO ALTER OR AMEND JUDGMENT OR MOTION FOR RELIEF FROM JUDGMENT, AND DENYING MOTION

The plaintiff, Owen Durigan, wrote to the court on July 1 9, 2000, questioning the Decision and Order Denying Plaintiff's Motion to Strike Summary Judgment Motion, Granting Defendants' Motion for Summary

Judgment, Denying Plaintiff's Motion to Strike Affirmative Defenses as Moot, and Dismissing Case With Prejudice. The letter states that the decision fails to address three factual issues that Durigan raised, and, on the basis of Seventh Circuit Rule 50 and due process, asks the court to hand down an amended decision addressing:

> Why the issues of fact that I raised regarding the reasonableness' of the Defendants' actions in forcing me and other Town of Brookfield residents to connect to the municipal water system are not sufficient to defeat the Defendants' summary judgment motion in view of the fact that:
>
> a) it must be assumed that there is NO contamination of private wells in the Town of Brookfield [supra];
>
> b) it must be assumed that relatively inactive wells such as those that remain in the Town after connecting to municipal water are MORE likely to become contaminated than they were before connecting [supra];
>
> c) it must be assumed that most residents do NOT cap their wells [supra];
>
> d) there must be a reasonable relationship between the sanitary District's objective of promoting the public health and safety and its actions in forcing residents to connect to its municipal water, which is a mixed question of fact and law for a jury to decide [supra];
>
> e) there is NO apparent logic to the

> Defendants' actions since there is NO problem in the Town for the Defendants to address, and their actions are counterproductive to their stated objective of promoting the public health and safety [supra];
>
> f) I specifically denied Defendants' proposed Finding of Fact No. 5 with Supporting evidence (supra].
>
> As part of this explanation, I request that Your Honor also explain how the Defendants' actions represent a rational response' to a 'legitimate problem' pursuant to Stern [Decision, p.9].

Although it is not identified as such, Durigan's letter is essentially a motion to alter or amend a judgment or relief from judgment under Federal Rule of Civil Procedure 59 or 60(b) and was filed within ten days of the entry of judgment. In addition, Durigan accuses the court of mistake,, or inadvertence as required by Rule 60. However, relief under Rule 60 is restricted to exceptional circumstances, *Harold Washington Party v. Cook County, Illinois Democratic Party,* 984 F.2d 875, *cert. denied,* 510 U.S. 825 (1993), and none has been shown here.

As an initial matter, Durigan relies on "factual issues" irrelevant to the court's analysis. He denies defendants' proposed finding that the water use ordinance at issue and its amendment were adopted and enacted pursuant to the authority granted to Sanitary District No. 4. However, simply denying the proposed finding does not create a genuine issue of material fact or preclude the court from finding as a matter of law that defendants enacted and later amended the ordinance consistent with the statutory authority. *See Posey v. Skyline Corp.,* 702 F.2d 102, 105 (7th Cir. 1983) ("[A] party may not rest on mere allegations

or denials . . . [and] a bare contention that an issue of fact exists is insufficient to raise a factual issue.")

Likewise, the court concluded that defendants satisfied the minimum rationality standard required of general economic and social welfare legislation even without a particularized showing of immediate danger to a resident of the subdivision. Defendants' reliance upon the enabling authority and stated interest in preventing contamination of groundwater bears a rational relationship to the subject ordinance. The court is not required to delve into whether or not inactive wells in the Sanitary District are prone to contamination or whether residents of Durigan's subdivision will cap their wells after connecting to the municipal water system.

Even if the factual issues raised by Durigan were relevant, they were not properly presented as required by Federal Rule of Civil Procedure 56. Durigan's affidavit of October 28, 1 999, (Doc. #58, Ex. X) contains inadmissible hearsay, for example paragraphs 2 and 3. The court cannot consider evidence regarding statements made by unidentified individuals in the Waukesha County Environmental Health Department regarding the risk of contamination to wells not used regularly, or conversations with residents of Durigan's subdivision regarding their intent to cap their wells.

Because Durigan has failed to establish mistake, inadvertance, or any other reason supporting relief from judgment, and the court has set forth the factual and legal reasons for its decision,

IT IS ORDERED that Durigan's letter dated July 19, 2000, is construed as a motion to alter or amend judgment or motion for relief from judgment.

IT IS FURTHER ORDERED that defendant's motion is denied.

Dated at Milwaukee, Wisconsin, this 8th day of August, 2000.

BY THE COURT

_____

C. N. CLEVERT
U. S. District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 30, 2001

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. RICHARD D. CUDAHY, *Circuit Judge*

Hon. RICHARD A. POSNER, Circuit Judge

OWEN S. DURIGAN, Plaintiff-Appellant, for	]	Appeal from the United States District Court
	]	the Eastern District of
No. 00-3024	v.]	Wisconsin.
	]	
SANITARY DISTRICT NUMBER 4-TOWN OF BROOKFIELD,	]	No. 99 C 262
ELVIN G. ATKINSON,	]	
Individually and in his official capacities as a Commissioner and as President of Sanitary District Number 4,	]	Charles N. Clevert, Judge.
THOMAS J. COLE,	]	
Individually and in his official capacities as a Commissioner and as Secretary of Sanitary District Number 4, et al.,	]	
Defendants-Appellees .	]	

Appendix D

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT- WITHOUT ORAL ARGUMENT

Date: February 26, 2001

BEFORE: Honorable WILLIAM J. BAUER,
Circuit Judge
Honorable RICHARD D. CUDAHY,
Circuit Judge
Honorable RICHARD A. POSNER,
Circuit Judge

No. 00-3024

OWEN S. DURIGAN,
Plaintiff - Appellant v.

v.

SANITARY DISTRICT NUMBER 4-
TOWN OF BROOKFIELD,
ELVIN G. ATKINSON, Individually and in his official capacities as a Commissioner and as President of Sanitary District Number 4, THOMAS J. COLE,
Individually and in his official capacities as a Commissioner and as Secretary of Sanitary District Number 4, et al.,
Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Wisconsin No. 99 C 262, Charles N. Clevert, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.